

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT BLUEFIELD

EDWIN RIVERA OTERO,

Plaintiff,

v.

CIVIL ACTION NO. 1:20-00223

WARDEN, FCI MCDOWELL,

Defendant.

**MEMORANDUM OPINION AND ORDER**

By Standing Order, this action was referred to United States Magistrate Judge Dwane L. Tinsley for submission of findings and recommendations ("PF&R") regarding disposition pursuant to 28 U.S.C. § 636(b)(1)(B). Magistrate Judge Tinsley submitted to the court his Findings and Recommendation on September 11, 2020, in which he recommended that the district court dismiss plaintiff's case for failure to prosecute.

In accordance with the provisions of 28 U.S.C.A. § 636(b), the parties were allotted fourteen days, plus three mailing days, in which to file any objections to Magistrate Judge Tinsley's Findings and Recommendation. The failure of any party to file such objections constitutes a waiver of such party's right to a de novo review by this court. Snyder v. Ridenour, 889 F.2d 1363 (4th Cir. 1989).

Magistrate Judge Tinsley recommended that this case be dismissed based upon plaintiff's failure to either pay the \$5.00 filing fee or file an Application to Proceed Without Prepayment

of Fees and Costs. Plaintiff was given almost six months to do so before the PF&R was filed. In his objections, plaintiff asks the court not to dismiss the case based upon his failure to pay the filing fee and indicated that the filing fee had been paid. See ECF No. 10. Plaintiff blames the COVID-19 pandemic for his failure to pay the filing fee earlier. However, despite plaintiff's statement that he had paid the required filing fee, he has still failed to do so. No filing fee has been received by the court nor has plaintiff filed an Application to Proceed Without Prepayment of Fees and Costs. Accordingly, his objection is **OVERRULED**.

Having reviewed the Findings and Recommendation filed by Magistrate Judge Tinsley, the court adopts the findings and recommendations contained therein. Accordingly, the court hereby **DISMISSES** this matter for failure to prosecute and directs the Clerk to remove this case from the court's active docket.

Additionally, the court has considered whether to grant a certificate of appealability. See 28 U.S.C. § 2253(c). A certificate will not be granted unless there is "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The standard is satisfied only upon a showing that reasonable jurists would find that any assessment of the constitutional claims by this court is debatable or wrong and that any dispositive procedural ruling is likewise debatable.

Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683-84 (4th Cir. 2001). The court concludes that the governing standard is not satisfied in this instance. Accordingly, the court **DENIES** a certificate of appealability.

The Clerk is directed to forward a copy of this Memorandum Opinion and Order to plaintiff, pro se, and counsel of record.

**IT IS SO ORDERED** this 14th day of March, 2023.

ENTER:

A handwritten signature in black ink, reading "David A. Faber", is written over a horizontal line.

David A. Faber  
Senior United States District Judge